BEFORE THE MILITARY COMMISSION
GUANTANAMO BAY, CUBA
4 MARCH 2009

UNITED STATES OF AMERICA	)	
	)	
v.	)	RULING ON D-001,
	)	Defense Motion for
AHMED KHALFAN GHAILANI	)	Appropriate Relief,
a.k.a. "Fupi",	)	Modification of Protective
"Haytham",	)	Order # 1
"Abubakar Khalfan Ahmed",	)	
"Sharif Omar"	)	

1. Procedural History. On 17 November 2008, the Defense moved this Commission to issue a Modification to Protective Order (#1)[hereafter PO1], previously issued by this Commission on 21 October 2008. The Government responded to the Defense's motion on 24 November 2008. Thereafter, the Defense filed additional pleadings with the Commission on 26 November 2008 and 16 January 2009. Neither party requested oral argument.

2. Issue. The Defense asserts the restrictions on all forms of evidence, discovery or conversations by and with the accused envisioned specifically or inferred by PO1 represents an overbroad and unnecessary impingement on the due process rights of the accused and his defense team. To correct this perceived set of unwarranted restrictions, the Defense proposed a series of corrective measures to PO1. The Government, in response, essentially objected to the majority of the Defense's assertions as well as the Defense's proposed fixes for perceived overreaching by the Government.

3. Discussion. It is beyond cavil that the Commission process as well as the application of Commissions per se must not only be fair and impartial but also must have the appearance and perception of fairness. Balanced against this undercurrent of justice lies the Government duty to not only provide discovery in the course of this criminal trial, they must also protect those sources, methods or activities which remain classified. There is no argument between counsel as to whether PO1 accomplishes this monumental task as it relates specifically to material that has been classified[1]. The primary question which remains is whether PO1, as currently constructed and written, is too expansive and encompasses other non-classified evidence/ discovery under a restrictive and protective national

[1] This motion was not directed toward any specific classification review issue on any particular item of evidence or discovery.

security umbrella.

It is irrefutable that a criminal defendant appearing before a military commission enjoys the right to a fair trial.[2] This Commission does not know the precise extent of discovery between the parties at this juncture. Further, this Commission is not wholly cognizant of the breadth and width of discoverable materials or the varying states of classifications of evidence or information remaining to be released (or contested). The Commission does appreciate the complexities of release, storage and inventory of classified material as well as the need to protect certain materials from improper disclosure in the interest of national security. This Commission is fully cognizant and recognizes that any court rulings and protective orders should be construed and constructed in such a manner to balance the understood national security dictates of any commission against the fundamental fairness which due process affords to any criminal defendant. [see United States v Dumeisi, 424 F.3d 566 (7th Cir. 2005), *cert. denied* 547 U.S. 1023, 126 S.Ct. 1570 (2006)]. It appears that the defense and the government fully understand their roles and limitations as well as the inherent authority of this Commission to set the limits of discovery. [see United States v Aref, 207 US Dist Lexis 12220 (N.D.N.Y. 2007 and United States v Musa, 833 F. Supp 752 (E.D. Mo. 1993)][3]

The Defense offers compelling argument that PO1, in its present state, affords prophylactic and unwarranted protections far exceeding that necessary to guard against unauthorized disclosure of classified material. In short, they argue that due process dictates, at best, that PO1 should represent nothing more than a focused yet restrictive protective order to protect the Government's national security dictates relative to classified material. I note that a prior ruling by this Commission declined to expand this Commission's protections via court order to open source material[4].

RULING: The Defense motion is granted in part and denied in part. The specifics of this ruling are provided below in accordance with the specific paragraph as it appears in PO1. . If a particular Defense motion was granted, this Commission determined that the Defense had met their burden of production and persuasion. This Commission fully recognizes and appreciates that additional *in camera* reviews may result from this ruling. Protective Order #4, which incorporates these changes, is issued in a separate Order which vacates Protective Order #1 and replaces it in this case. Protective Order #5, covering protected but unclassified information, is also issued.

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[2] See generally, 10 USC § 948a, *et seq.* (Military Commissions Act of 2006)

[3] All cited cases actually involved interpretation of the Classified Information Protection Act (CIPA).

[4] See Commission Ruling dated 4 December 2008 regarding Government Motion for Protective Order #3.

PARAGRAPH 6.b. Defense motion granted and this paragraph is void. Should the Government uncover any specific items of discovery/evidence of whatever nature or origin described in this paragraph which they deem should be accorded specialized treatment or consideration pursuant to MCRE 505(b)(1), further considerations of specific items of discovery/evidence may be requested pursuant standards set forth in MCDE 505(b)(3).

PARAGRAPH 6.h. Defense motion granted and the second sentence, in its entirety, is of this paragraph is void. Should the Government uncover any specific items of discovery/evidence of whatever nature or origin described in the second sentence of this paragraph which they deem should be accorded specialized treatment or consideration pursuant to MCRE 505(b)(1), further considerations of specific items of discovery/evidence may be requested pursuant standards set forth in MCDE 505(b)(3).

PARAGRAPHS 6.i, j, k, l & m. Defense motion is not opposed by the Government. Accordingly, these five sub-paragraphs are renumbered for convenience to Paragraph 8 of Protective Order # 4.

PARAGRAPHS 8 AND 9. For convenience, these paragraphs are renumbered as paragraphs 7b and 7c, respectively, in Protective Order #4.

PARAGRAPH 13. Defense motion is granted in part and denied in part. The following words are added to the second (final) sentence to the paragraph following the word, "Accused"; "...except as specifically enumerated in Paragraph 6.b above. Notwithstanding Paragraph 6(f) above, dialogue between the Accused and his Counsel is not limited by this provision. The Defense may not disclose Classified Information as defined by this Protective Order to the Accused unless it falls under the exception enumerated in Paragraph 6(b) above; but the Defense may discuss with the Accused, and disclose to other members of the Defense, possessing the requisite security clearances and having signed the MOU, an matters raised by the Accused in their meetings with him." The Commission notes that Government counsel concedes that dialogue by and with the Accused and Counsel is not intended to be limited by this provision. What is intended and interpreted by this Commission is that Classified Information as defined by properly issued protective orders, statutory or regulatory dictates or Rules of Court gleaned from whatever source may not be discussed by and with the Accused unless specifically enumerated in Paragraph 6.c of Protective Order # 1. The Commission believes the Defense has sought clarification in the abundance of caution as well as to avoid any confusion as to extent of their communications with their client. It is this Commission's interpretation that, by default, all information, discovery or evidence, not falling specifically within

what is described as Classified Information or specifically subject to properly issued protective orders, may be properly discussed between defense counsel and their client.

PARAGRAPH 14. The words "arraignment or other proceeding or in any other manner or setting in connection with" shall be replaced by the words, "any proceeding in".

PARAGRAPH 16. The first word of the Paragraph "Under" shall be replaced with the word, "Until".

PARAGRAPH 22. Defense motion granted. Paragraph 22 is deleted in its entirety and is void as it pertains to PO1. Should the Government perceive additional protections are necessary to preclude improper dissemination of information/discovery/evidence, relief may be requested and will be considered. R.M.C. 806(d) is germane. I also note JAGINST 5803.1C, in particular Rule 3.6 is also germane[5] to the issues highlighted by both parties. Release of Classified Information is adequately addressed in the balance of PO1, applicable orders, statutes and Court Rules.

PARAGRAPH 24. Defense motion is denied. If the Defense seeks specific relief from any particular demand for return of discovery, evidence, information (including Classified Information), an appropriate motion may be filed with the Commission for resolution of the matter.

PARAGRAPH 25. Defense motion is denied. The Defense has failed to convince this Court that arguably repetitive prohibitions are detrimental to effective representation or violates notions of due process.

PARAGRAPH 26 (and 6.g). Defense motion is denied. It appears that where presumptive conflicts exist in the Defense's opinion, clarification may be obtained via the SSA/ASA, Government Counsel or specific relief from this Court. Accordingly, the defense has failed in their burden on this specific issue.[6]

PARAGRAPH 29. Defense motion is denied. While the Commission agrees that affording Government Counsel the opportunity to terminate audio feeds to the public may be redundant, the defense has failed in their burden to

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[5] JAGINST 5803.1C dated 9 Nov 04 represents Professional Rules of Conduct for Judge Advocates under supervision of the Judge Advocate General of the Navy. Other services have also promulgated similar professional rules of conduct. Moreover, each attorney operates under the professional conduct rules of their respective state bar or professional supervisory organization.

[6] Note: This ruling is narrow as to the scope presented by the parties. Questions as to whether the application or authority of "presumptive classifications" in general or as applied in the case at bar was not briefed or considered by the Commission.

convince this Commission that such permissive language violates due process or the Accused's right to a public trial.

PARAGRAPH 38. This paragraph of PO # 1 is replaced by the following: "The Clerk of the Commissions will ensure that transcripts of all proceedings are reviewed by the SSA prior to authentication or certification by the Military Judge, to ensure that no Classified Information is contained therein. The Clerk of the Commissions will ensure that transcripts of any classified proceedings are properly segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a Secure Area, and released only as a classified document when necessary and appropriate and /or in the due course of law."

So Ordered this 4th Day of March, 2009.

B. W. MacKENZIE
Captain, U.S. Navy
Military Judge

UNITED STATES OF AMERICA v. AHMED KHALFAN GHAILANI	**D-001** **Defense Motion for Appropriate Relief** (Modification to Protective Order #1) 17 November 2008

1. Timeliness: This motion is timely filed. *See* Protective Order #1 (AE-12; herein out referred to as "PO 001").

2. Relief Sought: The Defense moves this Commission to make the following modifications to PO 001. Our justification for each request is contained in paragraph 6 below.

a. Strike paragraph 6b.

b. Strike the language from paragraph 6h which reads, "Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of "classified national security information or document" unless and until the Senior Security Advisor (SSA), in consultation with representatives from the appropriate agency, advises otherwise in writing."

c. Remove paragraphs 6i through 6m from the definition of "Classified Information" and relocate these terms in a more appropriate location within the Order.

d. Add the following language to the end of paragraph 13: "except as allowed for in paragraph 6c above. Additionally, this provision does not prohibit the Defense team from discussing with the accused matters which the accused told the Defense."

e. In paragraph 16, replace the first word "Under" with the word "Until".

f. Strike paragraph 22 in its entirety.

g. Modify paragraph 24 to read: "Persons subject to this Order are advised that all **classified** information to which they obtain access by this Order, or any other Orders issued by the Commission, is now and remain the property of the United States Government. The Defense shall return all **classified** materials that may come into their possession for which they are responsible because of such access upon demand by the Prosecution or SSA."

h. Strike paragraph 25 in its entirety.

i. To remove the presumption contained in paragraphs 6g and paragraph 26 that all statements by the Accused are classified at the TOP SECRET/SCI (TS/SCI) level and replace it with the guidance provided by the Central Intelligence Agency (CIA) for the protection of classified national security information enumerated by the CIA regarding former High Value Detainees (HVDs) currently in Department of Defense custody at U.S. Naval Station, Guantanamo Bay, Cuba (GTMO).[1]

j. Strike the language in paragraph 29 that allows the Trial Counsel to terminate the audio feed to the public.

[1] Herein referred to as "the CIA Memo." As it is classified, the Defense does not attach a copy of the CIA Memo to this motion. However, should the Commission or prosecution have any doubts as to which memorandum is being referenced, the Defense is willing and able to provide this memorandum for review.

3. **Overview:** It is the Defense position that PO 001 is in parts overly broad, unreasonable, and unnecessarily restrictive. By its terms, PO 001 renders information classified which is clearly not classified; this in turn imposes unnecessary storage and handling requirements upon the Defense. Additionally, the presumption that every statement by the accused is TS/SCI significantly and unnecessarily interferes with the Defense's ability to prepare its case and mount a defense on behalf of Mr. Ghailani. Finally, PO 001 purports to impose the equivalent of a "gag order" on the Defense.

4. **Burden and Standard of Proof**: As the moving party, the burden of persuasion rests with the Defense. In addition, the Defense bears the burden of proof on any question of fact; this burden is met by a showing of the preponderance of the evidence. *See* R.M.C. 905(c)(1).

5. **Facts**: On 21 October 2008, pursuant to an *ex parte* request by the government, the military judge issued PO 001. The Defense received no opportunity to review, comment, or object to any of the provisions of PO 001 prior to its issuance. Paragraph 43 of PO 001 permits either party to move for an exception to the order.

6. **Law and Argument**:

a. The Defense is fully cognizant of the need to protect any classified information in this case, and is committed to the same. "Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security." M.C.R.E. 505(a). The need to protect national security must be balanced against the right of an accused to receive a fair trial. The procedural protections and restrictions of PO 001, as authorized by M.C.R.E. 505(e), must "protect and restrict the discovery of classified information in a way that does not impair the defendant's right to a fair trial." United States v. Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005)(quoting United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002)). It is the Defense

position that the provisions of PO 001 that we object to and/or seek modification of, go beyond what is necessary to protect classified information and cross over into impairing Mr. Ghailani's right to a fair trial. We now address each of the proposed modifications individually:

b. ***Paragraph 6b***: Paragraph 6, and its subparagraphs, attempts to define the realm of what constitutes "Classified Information." Paragraph 6b refers to information which is entirely unclassified (Law Enforcement Sensitive (U//LES)/ For Official Use Only (U//FOUO)), and by the government's own admission "does not warrant a national security classification ..." While the government may have a legitimate interest in protecting this unclassified information from unnecessary disclosure, indiscriminately declaring that it shall be treated as "Classified Information" under PO 001 is neither reasonable nor appropriate. For example, M.C.R.E. 505(g) imposes an obligation upon the Defense to provide notice of its intent to disclose "classified information." Under the terms of PO 001, the Defense would apparently be obligated to disclose its intent to use any unclassified (U//LES) or unclassified (U//FOUO). Again, this is neither reasonable nor appropriate. The government has alternative means available to protect this type of unclassified information should it deem such protection necessary. In fact, the government has already availed itself to these alternative means through moving the court to issue Protective Order #2 (AE-14) which covers the law enforcement materials contained in the referral binder. We move to strike paragraph 6b in its entirety.

c. **Paragraph 6h**: The second sentence of this paragraph purports to say that any document that refers to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation (FBI), or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, should be presumed to be classified, apparently

even if it not appropriately marked as such. This is completely unreasonable and appears to place a burden on the Defense to presume that documents received in discovery may be classified, even though the government has delivered these documents to the Defense and asserted that they are not classified. It is incumbent on the government, and the appropriate classification authority, to classify and mark documents as they deem necessary to protect the interests of national security. This provision seems to create a presumption that the government and the listed agencies may be unable to carry out this duty. The Defense moves to strike this sentence in its entirety.

d. **Paragraphs 6i through 6m**: The Defense has no specific objection to these provisions, however, their inclusion under paragraph 6 which defines "Classified Information" is misplaced. These paragraphs describe conditions or requirements for the handling of classified information. They do not define or create categories of classified information; accordingly their inclusion under paragraph 6 is confusing.

e. **Paragraph 13**: This paragraph, in part, prohibits disclosure of classified information to the accused "[u]ntil further Order of this Commission." However, paragraph 6c creates a category of classified information, i.e. labeled "Releasable to Ghailani", which may be disclosed to the accused. These two paragraphs are in conflict and must be resolved. Additionally, POO 001, by its terms, places the Defense in an untenable vicious circle. If the Defense is forced to operate under the presumption that everything the accused tells us is classified, and at the same time the Defense is prohibited from discussing any classified information with accused, the terms of POO 01 would seem to prevent the Defense from engaging in any dialog with the accused. Surely this is not what is intended. In order to defend Mr. Ghailani, the Defense must be able to

at least discuss with the accused those matters which he discusses with us. The proposed modification to this paragraph would clarify that this is permissible.

f. **Paragraph 16**: This Defense believes that the first word "Under" is a typographical error, and should instead read, "Until." Otherwise, the Defense has no objection to this paragraph.

g. **Paragraph 22**: This paragraph has nothing to do whatsoever with the protection of classified information, which is the subject of PO 001. Rather, this paragraph purports to impose the equivalent of a "gag" order on the Defense which unnecessarily infringes on Mr. Ghailani's right to a public trial. See R.M.C. 806. More disturbing is that PO 001, with this provision included, was procured *ex parte*. Accordingly, the Defense received neither notice nor an opportunity to be heard on this issue. If the government believes that the circumstances of this case require some form of prohibition on extrajudicial statements, we request that the military judge order the government to comply with the notice requirements of R.M.C. 806(d). In the meantime, the Defense moves to strike this provision in its entirety.

h. **Paragraph 24**: This paragraph purports to allow the government to unilaterally and unconditionally require the Defense to return any provided discovery (classified or unclassified) upon request. Again, we respect the government's interest to preserve and protect the interests of national security, but as written, this paragraph is overly broad and goes above and beyond what is necessary to protect said interest. The Defense proposes to modify this provision to extend its application to only classified information. To allow otherwise provides the government a mechanism whereby they can unilaterally demand the return of unclassified discovery which they are obligated by law under the MCA and RMC to provide to the Defense in the first place. This possibility unreasonably impairs the Defense's ability to prepare for trial.

i. **Paragraph 25**: The Defense moves to strike this paragraph in its entirety. The Defense understands its obligations to provide notice M.C.R.E. 505(g). This is already addressed in paragraph 14 of PO 001.

j. **Paragraphs 6g and 26**:

The Defense moves to have this Commission remove the presumption contained in paragraphs 6g and paragraph 26 that all statements by the Accused are classified at the TS/SCI level and replace it with the guidance provided by the CIA Memo. The presumption that all statements made by the accused are classified at the TS/SCI level is overbroad, unnecessary, arbitrary, and substantially hinders the Defense's ability to prepare for trial and represent the accused. The presumption also impairs the Defense ability to investigate, consult with experts, and develop mitigation evidence. For example, hypothetically if the accused were to provide the names of character witnesses that he recommends we interview, the Defense must treat that information as TS/SCI and may not act upon it. The hypocrisy of this presumption is that Defense has every reason to believe that the majority of the accused's statements are not classified at all, and if classified, certainly not classified at the TS/SCI level. [redacted] This in turn triggers onerous storage and handling requirements upon the Defense. More significantly, the

presumption that all of the accused's statements are classified would also trigger the notice requirements of M.C.R.C. 505(g). Thus the Defense is confronted with a situation where the accused, with a right to remain silent, is presumptively compelled to provide notice to the government of the intent to use any of accused's statements at trial, where the government is not operating under the same set of rules. This presumption seems designed to unreasonably stymie the accused's right to remain silent and to permit the government to pierce this right rather than tailored to legitimately (and reasonably) protect the interest of national security.

In theory, the defense could seek a classification review of the information it learns and discovers while working with the accused. However, seeking a classification review each and every time the Defense seeks to disclose certain information would undoubtedly lead to years, not merely months, of delay. Seeking such a review would also almost always force the Defense to reveal information privileged from disclosure as attorney-client confidential information. *See* M.C.R.E. 502. For example, as a practical matter the Defense may be forced to turn over notes from a client interview to the "Original Classification Authority" for a classification review when the vast majority of that information clearly does not fall within the guidance of the CIA Memo. Forcing long delays and the disclosure of privileged information, without a rational basis for doing so, should not be permitted. Additionally, the defense is unaware whether there are presently in place any personnel who are tasked with processing declassification requests. Thus, without any means of effectively utilizing information provided by the accused, the Defense is unable to provide effective assistance of counsel to Mr. Ghailani.

The Defense understands the need to protect classified information and is committed to doing so. However, presumptively classifying all statements made by the accused at the TS/SCI level is unnecessary to safeguard against the inadvertent and/or unauthorized disclosure of classified information. It seems that the government has created this presumption not to protect the interests of

national security, but rather because it is just "too hard" for the government to classify (or declassify) information appropriately. The government's view seems to be something like "let's dump it all on the Defense, call it all classified now, and sort it out later." Yet, at the same time, the government is not playing by the same rules. The government's layers of bureaucracy, inefficiency, or inability to perform its job are not proper grounds to place an unreasonable and unjustified restriction upon the Defense. The Defense believes that the guidance provided by the CIA Memo is more than adequate to protect against the inadvertent and/or unauthorized disclosure of the categories of classified evidence defined by the memo. We move this Commission to adopt this guidance in lieu of the current presumption.

k. **Paragraph 29**: The Defense moves to strike that portion of this paragraph that allows the Trial Counsel to operate the "Switch" which cuts off the audio feed to the public. An SSA/ASA has already been detailed to this case by the military judge, who presumably is expected to act in a neutral and detached manner. The Trial Counsel, by definition, are neither neutral nor detached, rather they are an advocate for one side in this case. Empowering the Trial Counsel to act as "censors" by allowing them to unilaterally deprive the accused of the right to a public trial is patently wrong and entirely unnecessary in these proceedings.

7. Request for Oral Argument: The Defense does not request oral argument, unless the military judge determines that there is a dispute as to any material fact necessary for the resolution of the issue. If such a dispute were to arise, the Defense reserves the right to request production of witnesses and to request a hearing and oral argument.

8. Conference with Opposing Counsel: On 14 November 2008, the Defense conferred with the government regarding our requested relief. The government concurs in part and opposes in part as follows (paragraphs below correspond to our requested relief in paragraph 2 above):

2a. The government opposes striking the language in 6b, however, does not oppose moving paragraph 6b to a new paragraph outside the heading of "Classified Information."

2b. The government opposes this request.

2c. The government has no objection to moving paragraphs 6i-m from the definition of Classified information and re-designate them as new paragraphs.

2d. The government opposes the addition of the language to paragraph 13 as unnecessary. Paragraph 13 does not prohibit the Defense from discussing with the accused matters the accused told the Defense. Because the accused does not have the requisite clearance, it does prohibit the Defense from disclosing classified information the Defense obtained through the discovery process (or by other means) to the accused.

2e. The government has no objection to the word "until."

2f. The government opposes striking paragraph 22.

2g. The government opposes modification of paragraph 24.

2h. The government opposes striking paragraph 25.

2i. The presumption cannot be removed by anyone (including the military judge) except the original classification authority. *See* Executive Order 12598.

2j. The government opposes striking the language that allows Trial Counsel to terminate the audio feed.

9. Attachments:

A. Supporting Evidence to Charges (index)

B. [redacted]

[redacted]

Respectfully submitted,

By: /Colwell

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ATTACHMENT (A)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (B)

REDACTED FROM PUBLIC RELEASE

UNITED STATES OF AMERICA	)	
	)	
	)	**Prosecution Response to Defense Motion for Modification of Protective Order #1**
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	)	
v.	)	
	)	
	)	
AHMED KHALFAN GHAILANI a.k.a., "FUPI," "HAYTHAM," "ABUBAKAR KHALFAN AHMED," and "SHARIF OMAR"	)	
	)	
	)	
	)	
	)	
	)	
	)	**24 November 2008**

1. Timeliness. This response is filed in accordance with the timelines specified by Rule 3 6(b)(1) of the Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007.

2. Relief. The Prosecution respectfully requests that the Military Judge deny those modifications of Protective Order #1 requested in Defense Motion for Appropriate Relief (Modification to Protective Order #1) dated 17 November 2008 (hereinafter referred to as "defense motion" or "motion"). Specifically, the government opposes the modifications sought by defense in paragraphs 2.a., 2.b., 2.d., 2.f., 2.g., 2.h., 2.i., and 2.j. of its motion. The United States does not oppose the modifications sought in paragraphs 2.c. and 2.e. of the motion.

3. Overview. Contrary to defense assertions, Protective Order #1 is not "in parts overly broad, unreasonable and unnecessarily restrictive," and does not impose "unnecessary storage and handling requirements upon the Defense." Additionally, the presumption with respect to statements by the accused does not "significantly and unnecessarily" interfere with the ability to prepare a defense and Protective Order #1 does not amount to a "gag order" on the defense.

Rather, Protective Order #1 harmonizes the need to protect classified information in the national interest with the accused's right to obtain and present evidence in his defense.

4. Burden of proof. As the moving party, the defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion. *See* R.M.C. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).

5. Facts. On 22[1] October 2008 the Military Judge, pursuant to R.M.C. 701(f)(8) and (l)(2), Mil. Comm. R. Evid. 505 and Regulation for Trial by Military Commission (DoD Trial Reg), Sec. 17-3, issued Protective Order #1 pursuant to an *in camera, ex parte* motion[2] filed by the United States.

Defense motion was filed on 17 November 2008. On 14 November 2008, defense conferred with the government regarding the relief sought. As outlined in paragraph 2 above, the government concurred in part and opposed in part as follows (the paragraphs below correspond to the requested relief in paragraph 2 of defense motion):

2.a. The government opposes striking paragraph 6b. However, the government does not oppose moving paragraph 6b in its entirety to a new paragraph outside the heading of "Classified Information."

2.b. The government opposes the request to strike the language in paragraph 6h which reads, "Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of 'classified national security information or document' unless and until the Senior Security Advisor (SSA), in consultation with representatives from the appropriate agency, advises otherwise in writing."

2.c. The government has no objection to moving paragraphs 6i-m in their entirety from the definition of Classified Information and re-designating them as new paragraphs.

2.d. The government opposes the addition of the following language to paragraph 13: "except as allowed for in paragraph 6c above. Additionally, this provision does not prohibit the Defense team from discussing with the accused matters which the accused told the Defense." The United States submits that this language is unnecessary. Protective Order #1, including paragraph 13, does not prohibit the defense from discussing with the accused information the accused provides to the defense. However, because the accused does not have the requisite clearance, it does prohibit the defense from disclosing classified information the Defense obtained through the discovery process (or by other means) to the accused.

2.e. The government has no objection to substituting the word "Until" for the word "Under" in paragraph 16.

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[1] Defense motion notes that Protective Order #1 was issued on 21 October 2008. The protective order was actually signed by the Military Judge on 22 October 2008. The date noted on the first page of Protective Order #1 is 21 October 2008. The United States apologizes for the confusion this has caused.

[2] Mil. Comm. R. Evid. 505, DoD Trial Reg. Sec. 17-3 and R.M.C. 701(f)(8) and (l)(2) allow motions for protective orders to be made *ex parte* and *in camera.*

2.f. The government opposes striking paragraph 22.

2.g. The government opposes modifying paragraph 24 to read: "Persons subject to this Order are advised that all **classified** information to which they obtain access by this Order, or any other Orders issued by the Commission, is now and remain the property of the United States Government. The Defense shall return all **classified** materials that may come into their possession for which they are responsible because of such access upon demand by the Prosecution or SSA."

2.h. The government opposes striking paragraph 25.

2.i. The presumption contained in paragraphs 6g and 26 that all statements made by the accused are classified cannot be removed by anyone (including the military judge) except the original classification authority. *See* Executive Order 12598.[3]

2.j. The government opposes striking the language that allows Trial Counsel to terminate the audio feed.

6. Discussion.

This section will discuss the government's bases for opposition to or concurrence with defense requests for modification in the order in which the requests were made. The United States will identify the defense requests with the identifying paragraphs used in the defense motion.

2.a. The United States opposes defense request to strike the language in paragraph 6b. However, the United States does not oppose moving paragraph 6b, in its entirety, and re-designating it as a new paragraph outside the definition of classified information.

2.b. The United States opposes the defense request to strike the requested language in paragraph 6h. However, to clarify paragraph 6h, the United States proposes adding the following language after 6h:

This provision shall not apply to documents or information which the defense obtains from other than classified materials, or to public court documents or to documents which are provided by the government with a marking to indicate that the document has been "declassified." While the information in the public domain is ordinarily not classified, such information may be considered classified (due to previous unauthorized disclosures of classified information), and therefore subject to the provisions of Mil. Comm. R. Evid. 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial corroborates or tends to refute the information in question. Any attempt by the Defense to

[3] Executive Order 12958 was amended by Executive Order 13292. *See* Exec. Order No. 13292, 68 Fed. Reg. 15315 (March 28, 2003). All citations to Executive Order No. 12958, 3 C.F.R. 333 (1995), *reprinted as amended in* 50 U.S.C.A. § 435 note at 205 (West Supp. 2008).

have such information confirmed or denied during these proceedings shall be governed by Mil. Comm. R. Evid. 505 and all provisions of this Order.

2.c. The government has no objection to moving paragraphs 6i-m, in their entirety, from the definition of Classified Information and re-designating them as new paragraphs.

2.d. The government opposes the defense request to add the following language to paragraph 13: "except as allowed for in paragraph 6c above. Additionally, this provision does not prohibit the Defense team from discussing with the accused matters which the accused told the Defense."

Paragraph 13, as written in Protective Order #1 does not prevent, as defense asserts, counsel from "engaging in any dialogue with the accused." Paragraph 13, as written, does not prevent defense counsel from discussing with the accused information, which is presumptively classified, provided by the accused. However, since the accused does not possess the requisite clearance, defense counsel cannot provide or discuss classified information obtained by the defense through the discovery process or other sources absent a court order. In certain limited circumstances, discovery may be provided to the accused in a classified format, and will be marked "Releasable to Ghailani."

2.e. The government has no objection to substituting the word "Until" for the word "Under" in paragraph 16.

2.f. The government opposes striking paragraph 22. The government rejects the defense assertion that paragraph 22 imposes a "gag order" on the defense.

This matter involves and implicates national security issues and deals with classified and protected information. Paragraph 22 ensures that discovery provided to the defense team is to be used by the defense for the defense of the accused, and not disseminated to the media. The order not to disseminate discovery information to the media does not infringe on the accused's right to a public trial. The accused has the right to a public trial. *See* R.M.C. 806. The right to a public trial does not include dissemination of discovery to the media.

Defense finds "disturbing" the fact that the prohibition against disseminating discovery to the media was procured *ex parte*, thereby denying defense with an opportunity to be heard on the issue.[4] There should be nothing disturbing about such hearings.

Mil. Comm. R. Evid. 505, DoD Trial Reg. 17-3, and R.M.C. 701(f)(8) and (l)(2) allow motions to be made *ex parte* and *in camera.* The United States disagrees that it is "disturbing" when such rules are followed.

[4] The United States disagrees that defense is denied the opportunity to be heard. As noted in paragraph 43 of Protective Order #1, "Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted." Defense counsel has that opportunity to be heard on the issue by the filing of this motion.

2.g. The government opposes modifying paragraph 24 to read: "Persons subject to this Order are advised that all **classified** information to which they obtain access by this Order, or any other Orders issued by the Commission, is now and remain the property of the United States Government. The Defense shall return all **classified** materials that may come into their possession for which they are responsible because of such access upon demand by the Prosecution or SSA."

The defense asserts, in support of its modification restricting what information must be returned to the government to only classified information, that to allow paragraph 24 to remain in its present form "provides the government a mechanism" to unilaterally demand the return of any discovery the government is obligated to provide thereby reasonably impairing the ability of the defense to prepare for trial. This assertion is incorrect.

Discovery information and materials are being provided to the defense for the purpose of preparing their defense. The government does not intend to demand a return of such items **until the conclusion of the case**. At that time, there is no reason why any and all information and material, which is the property of the United States Government, should not be returned so that the government can insure that classified and protected information remains protected. The return of such information limits the risk of unauthorized disclosure and limits defense counsel's liability regarding unauthorized disclosure upon the conclusion of the case. The fact that the government, pursuant to the rules of discovery, is obligated to provide information does not result in a right of the defense to keep government information at the conclusion of trial.

2.h. The government opposes striking paragraph 25. However, the government suggests replacing paragraph 14 of Protective Order #1 with paragraph 25 of the Protective Order.

2.i. Defense requests that the military judge remove the language contained in paragraphs 6g and 26 of Protective Order #1 that all statements of the accused are presumptively classified. The United States respectfully submits that the military court lacks the authority to change the determination that "the statements of the Accused are to be presumptively treated as classified information, classified at the TOP SECRET//SCI level."

Section 1.1(a) of Executive Order 12958 provides that information may be originally classified if certain conditions are met.

Section 1.3(a) of the Executive Order provides that the authority to classify information originally may be exercised only by the President and, in the performance of executive duties, the Vice President; agency heads and officials designated by the President in the Federal Register; and United States Government officials delegated this authority pursuant to section 1.3(c) of the Order. Section 1.3(c)(2) provides that TOP SECRET original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to section 1.3(a)(2) of the Executive Order.

In accordance with section 1.3(a)(2) of the Order, the president has designated the Director of the CIA as an official who may classify information originally as TOP SECRET.[5] Under the authority of section 1.3(c)(2), the Director of the CIA has delegated original TOP SECRET authority to the Deputy Director of the CIA, who is therefore authorized to make original classification and declassification decisions regarding national security information implicated in this case.

The statements of the accused were classified by the appropriate classification authority and such information may not be declassified by the military court. *See generally* Executive Order 12958.

In fact, a court may not even decide whether a statutorily authorized proposed alternative to disclosure of classified information is sufficient for the protection of the national interest. *See United States v. Juan*, 776 F.2d 256, 258-59 (11th Cir. 1985) (holding that the decision whether or not a CIPA alternative to disclosure of classified information would be sufficient for the protection of the national interest in the security of classified information is not to be determined by the court. "What may appear to the court to be innocuous may be dangerously revealing to those more informed.")

2.j. The government opposes striking the language that allows Trial Counsel to terminate the audio feed.

Pursuant to 10 U.S.C. § 949(f)(1)(C), the Director of the CIA has delegated his authority to assert the National Security Privilege over classified information, for which his agency is the originator, to the Office of Military Commissions (OMC) security personnel and Trial Counsel in Military Commission cases.

Contrary to defense assertion that paragraph 29 allows trial Counsel to "act as 'censors'" thereby depriving "the accused of the right to a public trial," the ability of the Trial Counsel to terminate the audio feed is further necessary insurance that classified information, the disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security, or serious or severe damage will not be disclosed. The ability of the Trial Counsel to prevent such disclosure no more deprives the accused of a public trial than the ability of the SSA to do the same.

This matter involves information classified at the CONFIDENTIAL, SECRET and TOP SECRET levels. If an unauthorized disclosure of information reasonably could be expected to cause **damage** to the national security, that information may be classified as CONFIDENTIAL. If an unauthorized disclosure of information reasonably could be expected to cause **serious damage** to the national security, that information may be classified as SECRET. If an unauthorized disclosure of information reasonably could be expected to cause **exceptionally grave damage** to the national security, that information may be classified as TOP SECRET.

[5] Order of President, Designation under Executive Order 12958, 70 Fed. Reg. 21,609 (Apr. 21, 2005), *reprinted in* U.S.C.A. § 435 note at 205 (West Supp. 2008).

Therefore, it is imperative that as many safeguards against disclosure of classified information be available during the commission process.

Pursuant to 10 U.S.C. § 949(f)(1)(C), the Director of the CIA has delegated his authority to assert the National Security Privilege over classified information, for which his agency is the originator, to the Office of Military Commissions (OMC) security personnel and Trial Counsel in Military Commission cases. Therefore, Trial Counsel has the authority to claim the National Security privilege and protect the information by terminating the audio feed. Obviously, Trial Counsel will do so only when warranted.

Should Trial Counsel erroneously terminate the audio feed, the information erroneously thought to be classified, will be made public. However, once classified information is erroneously disclosed, the harm is irreparable. To guarantee, to the greatest extent possible under the circumstances, that such irreparable harm does not occur to the national security, the government submits that paragraph 29 remain unmodified.

7. **Oral Argument**. The Prosecution does not request oral argument.

8. **Witnesses**. The Prosecution does not anticipate calling witnesses in connection with this motion; however, it reserves the right to amend this request should the Defense response raise issues that would require the Prosecution to call witnesses in order to rebut certain information.

9. Certificate of Conference. On 14 November 2008, defense conferred with the government regarding their requested relief. A conference with defense regarding this response is not required. *See* Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007, Form 3-2 Format for a Response.

10. Additional Information. None.

11. Attachments. None.

12. Submitted by:

____//signed//_____
Felice John Viti
Prosecutor

____//signed //_____
John McAdams
Prosecutor

____//signed_____
Jeffrey B. Jones
Prosecutor

UNITED STATES OF AMERICA v. AHMED KHALFAN GHAILANI	**D-001** **Defense Reply** (to Government Response to Defense Motion for Appropriate Relief: Modification to Protective Order #1) 26 November 2008

1. Timeliness: This reply is timely filed in accordance with Rule 3 paragraph 6(c)(2) of the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007.

2. Reply: In paragraph 3 of it's response to this motion, the government states that "Protective Order #1 harmonizes the need to protect classified information in the national interest with the accused's right to obtain and present evidence in his defense." We agree with the government that this is what PO 001 *should* do; our objection however, is that PO 001 far exceeds these ends. A majority of our objections, and our proposed modifications, to PO 001 have nothing to do with the protection of classified information. We believe that a majority of the objectionable provisions were inappropriately "boot strapped" by the government under the guise of "national security," should not have been procured via an *ex parte* request to the military judge, and do not appropriately belong within the context of an order designed to protect classified information. Our reply refers to the "Discussion" contained in paragraph 6 of the government's response which references the individual provisions of PO 001 the Defense has put at issue.

2a. Law Enforcement Sensitive (U//LES)/ For Official Use Only (U//FOUO) is not a classification. These are nomenclatures used within government agencies designed to internally highlight that information contained within a document may be exempt from release under the Freedom of Information Act (FOIA). Neither U//LEF or U//FOUO, in and of themselves, are

exemptions under FOIA. *See e.g.* Dep't of Defense, Reg, 5200.1R, Information Security Program, para. AP3.2 (Jan 1997). Accordingly, these materials are not covered by any national security privilege, and do not appropriately belong in a protective order the purpose of which is to protect classified information. As stated in our original motion, the government has alternative means available to protect this type of unclassified information on a case-by-case basis should it deem such protection necessary; but doing so through a blanket *ex parte* request under the guise of asserting a national security privilege is inappropriate.

2b. The proposed language offered by the government to be added to paragraph 6h of PO 001 is acceptable to the Defense and would adequately address our concerns.

2d. In its response, the government states that paragraph 13 of PO 001 does not prohibit the Defense team from discussing with the accused matters which the accused told the Defense. In an abundance of caution, the Defense requests that this allowance be memorialized in writing within the text of PO 001. Additionally, we still maintain that there is an internal conflict within PO 001 regarding disclosure of classified information to the accused that must be resolved. Adding the language, "except as allowed for in paragraph 6c above," would easily eliminate this internal conflict.

2f. The government's response glosses over the fact that paragraph 22 of PO 001 applies to "[a]ny and all discovery ... provided to the Defense" and states that "none of the discovery ... [provided to the Defense] shall be disseminated to, or discussed with the media." (Emphasis added). The government may not like our characterization of this provision as a "gag" order, but for all intents and purposes, this provision serves to bar Defense discussions with the media. As officers of the court, our respective Rules of Professional Responsibility and the Regulation for Trial by Military Commissions already provide guidance on extrajudicial statements, which

encompasses discussions with the media. Should we run afoul of these rules, or should circumstances arise which cause the government to believe that some form of prohibition on extrajudicial statements is appropriate, R.M.C. 806(d) provides an avenue of redress that the government should be compelled to follow. Additionally, the Defense acknowledges that the applicable rules allow for *ex parte* and *in camera* filings with the court. However, we believe that use of such procedures should be the exception and not the rule. *Ex parte/in camera* proceedings generally contemplate that the moving party (in this case the government) will request *ex parte* that the military judge review *in camera* certain materials to determine whether the government's claim of privilege or protection is valid. That did not happen in this case. In securing paragraph 22 of PO 001, the government did not provide any of the discovery materials to the military judge for review along with their justification for this restriction. Instead, this overly broad provision was simply tucked into the government's proposed protective order, procured through an *ex parte* submission under the guise of protecting national security, where once again, this provision unreasonable applies to a universe much broader than simply classified information.[1]

2g. In paragraph 24 of PO 001 and in the government's response to this motion, the government seems to assert some form of possessory right in all discovery provided to the Defense in this case. RMC 701(l) permits the military judge to regulate the time, place, and manner of discovery and prescribe conditions as are just. We believe that such an unlimited and unfettered possessory claim and right to unilaterally reclaim any and all provided discovery is both unreasonable and unjust. In their response, the government also seems to suggest that they

[1] While we maintain it would be unnecessary, the Defense has no objection to modifying paragraph 22 to restrict the prohibition only to classified information. "Any and all classified discovery materials are to be provided to the Defense, and used by the Defense, solely for the purposes of preparing the defense and that none of the classified discovery materials produced by the Prosecution to the Defense shall be disseminated to, or discussed with the media."

are doing the Defense a favor by including this provision in PO 001 by "limit[ing] defense counsel's liability regarding unauthorized disclosure upon conclusion of the case." While we appreciate the government's concern for our welfare, we believe as officers of the court, we are fully competent to fend for ourselves.

2i. With respect to paragraphs 6g and 26 of PO 001 that all statements by the accused are presumed classified as TS/SCI, the Defense recognizes that the military judge has no authority to challenge or overrule the classification. However, the military judge does have the authority to control the contents of any protective order and, where the interests of justice dictate, can refuse to issue said order. We believe that these provisions are overly restrictive, that less restrictive provisions could be implemented in their place and still adequately preserve the government's need to protect classified information, and that under the current landscape of this case, the interests of justice dictate that accused can not receive a fair trial under such onerous conditions.

2j. The Defense believes that there is a significant difference between the government's right to assert a national security privilege and its current ability, contained in paragraph 29 of PO 001, to censor the outgoing audio feed of an ongoing commissions proceeding. 10 USC 949d(f)(2)(C) entitled "Assertion of National Security Privilege at Trial" addresses the mechanics to be used in these circumstances. This provision provides that the trial counsel can object during any line of questioning and assert a national security privilege on behalf of its beholder. The statute says nothing about the trial counsel being able to cut the audio feed. There are already numerous redundancies built into this case designed to protect the inappropriate release of classified information. MCRE 505 provides detailed requirements for the introduction of classified evidence. PO 001 has been issued by the military judge. An SSA has been appointed to be present for all hearings. [redacted]

[redacted] Allowing the trial counsel to cut the audio feed is overkill. Furthermore, considering the role of the trial counsel as an advocate for the government, the Defense believes that empowering the trial counsel to cut the audio feed would cause any casual observer of this case to question the fairness of the proceedings.

3. **Citations to Additional Authority:** None.

4. **Witnesses:** None.

5. **Additional information not provided above**: None.

6. **Additional Attachments:** None.

Respectfully submitted,

By: _____
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

UNITED STATES OF AMERICA

v.

AHMED KHALFAN GHAILANI

D-001

Defense Supplement
(to Defense Motion for Appropriate Relief: Modification to Protective Order #1)

16 January 2009

1. **Timeliness**: Pursuant to Rule 3, paragraph 4, of the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007, the Defense respectfully requests that the military judge consider this supplemental filing in support of D-001, the Defense Motion for Modification to Protective Order #1 (PO 001).

2. **Nature of supplemental filing:** The Defense respectfully requests that the military judge consider three additional attachments in support of D-001 prior to issuing a ruling. These attachments consist of: 1) a copy of the protective order issued in the case of United States v. Zacarais Moussaoui in the United States District Court for the Eastern District of Virginia; 2) a copy of the Defense Request for Appointment of Privilege Team dated 8 December 2008; and 3) the Convening Authority's denial of this request dated 12 January 2009.

4. **Discussion:**

a. The essence of D-001 is that PO 001 is in parts overly broad, unreasonable, and unnecessarily restrictive. While the Defense recognizes that every case is different, we invite the military judge to review Attachment A, the protective order issued in United States v. Zacarias Moussaoui[1], for comparison sake. The Military Commissions are in their infancy; to date, only three cases have been tried to completion. Federal Courts on the other hand have had vast

[1] The Defense requests, pursuant to MCRE 201, that the military judge take judicial notice of the fact that Zacarias Moussaoui is a French citizen who was convicted of conspiring to kill citizens of the United States as part of the September 11, 2001 terrorist attacks.

experience handling classified information for years. The Defense draws the military judge's attention to the fact that none of the provisions of PO 001 that the Defense has objected to are included in Attachment A. The Defense specifically draws the military judge's attention to paragraph 21 of Attachment A. This provision addresses the requirement that the Defense return classified information provided to them in discovery upon request by the government. This provision is almost identical to the language the Defense has moved to court to adopt when modifying paragraph 24 of PO 001. Again, the Defense requests that the military judge consider Attachment A for demonstrative and persuasive purposes when assessing the necessity and reasonableness of the provisions of PO 001 at issue.

b. The presumption that all statements made by the accused are classified at the TS/SCI level is overbroad, unnecessary, arbitrary, and substantially hinders the Defense's ability to prepare for trial and represent the accused. As we stated in our Reply, we recognize that the military judge has no authority to challenge or overrule the classification, but the military judge does have the authority to control the contents of the protective order and, where the interests of justice dictate, can refuse to issue said order. In Attachment B, the Defense requested that we be appointed a privilege team in order to allow the Defense to submit attorney-client privileged information for review. Such a resource already exists for attorneys handling Federal habeas cases for Guantanamo Bay detainees. The privilege team would allow the Defense to safely and confidentially negotiate around the TS/SCI presumption imposed by PO 001. As we pointed out in D-001, our motion, the Defense has reason to believe that the majority of the accused's statements are not classified at all. On 12 January 2008, the Convening Authority denied our request. The TS/SCI presumption imposed upon the Defense coupled with the government's unwillingness to provide the Defense any reasonable means to overcome the presumption leave

the Defense without any means of effectively utilizing information provided by the accused. As a result, the Defense is unable to provide effective assistance of counsel to Mr. Ghailani. Accordingly, this provision must be struck from PO 001 in order to allow Mr. Ghailani to receive a fair trial.

5. Witnesses: None.

6. Additional information not provided above: None.

7. Conference with Opposing Counsel: On 16 January 2009, the Defense conferred with the government regarding this filing. The government does not oppose the military judge considering this supplemental filing; however, the government desires the opportunity to respond to it – to which the Defense has no objection.

8. Additional Attachments:

A. Copy of protective order issued in the case of United States v. Zacarais Moussaoui in the United States District Court for the Eastern District of Virginia.

B. Defense Request for Appointment of Privilege Team of 8 December 2008

C. Convening Authority's denial of Defense Request for Privilege Team of 12 Jan 2009.

Respectfully submitted,

By: _____

LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

ATTACHMENT (A)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (B)

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

8 December 2008

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Appointment of Privilege Team - *United States v. Ahmed Khalfan Ghailani*

References: (a) Protective Order #1 ico *United States v. Ahmed Khalfan Ghailani*
(b) D-001 Defense Motion to Modify Protective Order #1
(c) *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. November 8, 2004)
(d) *In re Guantanamo Bay Detainee Litigation*, 2008 U.S. Dist. LEXIS 69254 (D.D.C. September 11, 2008)

1. The Defense respectfully requests that a privilege team be appointed to assist the Defense in the above named case. We request that this privilege team be independent from your office and that of the prosecution, in order to allow us to submit attorney-client privileged information to the designated privilege team for review. The sole purpose of this request is to allow us to provide adequate legal representation to Mr. Ghailani; however, we note that attachment (1) contains a May 29, 2008 e-mail request to you from the then Chief Defense Counsel, Office of Military Commissions (OMC) seeking appointment of a privilege team to support the entire OMC-Defense mission. This request received a favorable recommendation from both the Joint Task Force – Guantanamo and from the U.S. Southern Command. It is our understanding that, to date, this request has not been formally acted upon.

2. Reference (a) currently provides that "the statements of the Accused are to be presumptively treated as classified information, classified at the TOP SECRET//SCI level." While the Defense has reason to believe that a majority of the statements of the accused are not classified at all, or at least not classified at the TS/SCI level, there is no mechanism in place to allow us to overcome the TS/SCI presumption. This means that any notes we take during our meetings with Mr. Ghailani are presumptively TS/SCI material and therefore we can not act upon any of the information that we receive from him. For example, if Mr. Ghailani were to provide us the name of a potential witness to contact, even the name of a family member, we could not act upon that information because it is presumptively classified at the TS/SCI level. This situation prevents the Defense from being able to provide Mr. Ghailani the adequate assistance of counsel that he is entitled.

3. In reference (b), the Defense has already requested, in part, to remove the presumption contained in paragraphs 6g and paragraph 26 [of Protective Order #1] that <u>all</u> statements by the Accused are classified at the TOP SECRET/SCI (TS/SCI) level and replace it with the guidance provided by the Central Intelligence Agency (CIA) for the protection of classified national security information enumerated by the CIA regarding former High Value Detainees (HVDs) currently in Department of Defense custody at U.S. Naval Station, Guantanamo Bay, Cuba (GTMO).[1] This motion is still pending with the military judge; however, in their response to this motion the prosecution has objected to removal of the presumption and argued that the military judge has no authority to either remove or modify the presumption. If this presumption must remain, appointment of the requested privilege team would at least provide the Defense a mechanism to overcome this presumption.

[1] As it is classified, the Defense does not attach a copy of the CIA Memo to this request. However, should the Convening Authority have any doubts as to which memorandum is being referenced, the Defense is willing and able to provide this memorandum for review.

4. We believe that our request is neither unreasonable nor novel. In references (c) and (d), a privilege team has been appointed to assist the defense in all of the detainee habeas petitions in the United States District Court for the District of Columbia. As you probably already know, this privilege team is "[a] team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee." Reference (b) at p. 184. It is our understanding that the current habeas privilege team is comprised of mostly contract employees who possess past intelligence and/or law enforcement experience with the federal government. While you are certainly at liberty to grant our request in any fashion you deem appropriate, we believe that leveraging off of the existing habeas privilege team makes the most sense. The team already exists, has resources in place, has relevant experience in the areas we seek assistance, and has an existing contractual vehicle to obligate funding against. Our request may be accommodated with minimal additional investment in resources and funding.

5. In closing, we believe that appointment of the requested privilege team is essential in order to provide Mr. Ghailani adequate legal representation, will help avoid future delays in this case, and, from the government's perspective, will add an additional layer of protection for the handling of classified information in this ease. We respectfully request a written response to this request. We welcome the opportunity to discuss this request with you or your legal advisor in person. I may be contacted at: [redacted]

Respectfully submitted,

By: _____
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

Attachment:
1. CDC email re: Privilege Teams-Classification Teams of 29 May 08 w/ ends

ATTACHMENT (1)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (C)

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

JAN 12 2009

MEMORANDUM FOR: LtCol J.P. Colwell, USMC, Defense Counsel, OMC
MAJ R.B. Reiter, USAFR, Defense Counsel, OMC

SUBJECT: Request for Appointment of Privilege Team – *United States v. Ahmed Khalfan Ghailani*

I reviewed your letter dated 8 December 2008 requesting appointment of a privilege team in the case of *United States v. Ahmed Khalfan Ghailani*. There are procedures in place in the Military Commissions system, similar to the federal system, whereby counsel may receive advice on security matters from Court Security Officers (CSO). There are currently five CSOs in the Military Commission organization which defense counsel may call upon for guidance on classification matters. Further, a Special Security Officer (SSO) provides an additional layer of support for the defense teams. When necessary, the defense SSO can interface with the appropriate Original Classification Authorities (OCA) to request further guidance on your behalf. Because there are existing procedures for dealing with classified information, I am not persuaded that it is necessary to appoint a privilege team. Therefore, your request is denied.

Susan J. Crawford
Convening Authority
for Military Commissions